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Supreme Court of the United States

OCTOBER TERM, 1950—No. 285

Estate of MAX STRAUSS, also known as MARX STRAUSS, deceased, MARJORIE F. TREGANOWAN, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

Estate of Max Strauss, also known as Marx Strauss, deceased, Marjorie F. Treganowan, Executrix, *Petitioner,* v. Commissioner of Internal Revenue, *Respondent.*	October Term, 1950 No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Estate of Max Strauss, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case June 6, 1950 (R. 64*).

Opinions Below

The opinion of the Tax Court (R. 22-35) is reported in 13 T. C. 159. The opinion of the Court of Appeals for the Second Circuit (R. 54-62) is reported in F. 2d .

Jurisdiction

The jurisdiction of this Court is invoked under Tit. 28 U. S. C. § 1254(1) (62 Stat. 928) and under I. R. C. Tit. 26 U. S. C. § 1141(a) (53 Stat. 164 as amended by 62 Stat. 991 and 63 Stat. 107). The judgment of the Court of Appeals was entered June 6, 1950.

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* References are to the printed record.

Questions Presented

1. Is an amount received by the widow of the deceased from the Gratuity Fund of the New York Stock Exchange includible in the decedent's gross estate as life insurance under § 811(g) of the Internal Revenue Code?

2. If so, is there an "incident of ownership" in a policy of insurance, within § 404(c) of the Revenue Act of 1942, to be found in the mere fact that the disposal of a membership in the New York Stock Exchange incidentally carries with it the right of the next-of-kin of a member to receive on his death amounts collected from other members by the Gratuity Fund.

Statutes Involved

In the appendix below at pages 11-14 will be found the pertinent provisions of the statutes (§ 811(g)(2) of the Internal Revenue Code as amended by § 404(a) of the Revenue Act of 1942; § 404(c) of the Revenue Act of 1942) and pertinent parts of Treasury Regulations (Reg. 105, §§ 81.25, 81.27).

Summary Statement of the Matter Involved

A deficiency of $5,883.93 in petitioner's estate tax was found by the Commissioner (R. 22), on the basis of a determination that $20,000 paid out of the Gratuity Fund of the New York Stock Exchange to the widow was includible in decedent's gross estate within § 811(g) of the Internal Revenue Code (R. 27). The estate petitioned the Tax Court for a redetermination, contending (1) that the $20,000 did not constitute proceeds of life insurance and was not received "as insurance under policies upon the life of the decedent"; (2) that even if the amount did constitute insurance, still under § 404(c) none—or at most only a small proportion—of the alleged deficiency existed because (a) the decedent had no incident of ownership after January 10, 1941 and (b) he paid no premiums—or at most only a small proportion of the total—after that date. (*Cf.* R. 32, 22-3).

Facts were found by the Tax Court on the basis of a stipulation of facts (R. 23, 36-46); and the constitution of the New York Stock Exchange (an exhibit) was incorporated by reference in the Tax Court's decision (R. 23). The Gratuity Fund plan of the Exchange in its essential features has been in operation since 1873 (R. 23, 38, 40), long before there was any estate tax at all, and of course long before there was any provision as to includibility of insurance. The chief characteristics of the plan as at the death of the decedent in 1944 can be outlined as follows:

Participation in the plan was an incident of membership in the Exchange. Every member was to make a payment to trustees of the Fund ($15.00) upon being admitted to membership (R. 23-4, 38) and pledge himself to make a gift ($15.00) to the family of a deceased member on a member's death (R. 24, 38) on penalty of suspension (R. 25, 41). In the case of anyone still a member at his death, the Exchange was to pay over to his family so much of $20,000 as was collected from the other 1,374 members; it was expressly provided by the Stock Exchange constitution that there was no liability of the Exchange to pay anything except as thus collected (R. 24, 25, 49). It will thus be seen that there was no possibility of choice on the part of a member whether or not to participate in the plan; nor was the Exchange free to reject any member as a participant in the plan whatever his age or state of health, or to vary according to such factors the amounts to be paid.

No member had any right to designate who should receive the $20,000, or any power or right to divert the benefits; the relative who was to receive the amount was named by the constitution of the Exchange (R. 24-25, 40), which could be changed only if (1) the change was first approved by the board of governors, and (2) 688 members out of 1,375 voted on the amendment and a majority thereof approved (R. 43, 38).

The Gratuity Fund had been built up out of profits of the Exchange as well as out of interest on investments, the payments of the initial fee, and the slight excess of collec-

tions from surviving members over the amount paid to the kin of deceased members (R. 26, 38-39). Later, allocation of profits of the Exchange and then accumulation of income were stopped; and credits were made out of the Fund against members' obligations on account of other members' deaths (R. 26, 39). The payments and credits of decedent were as follows:

	Amounts payable on account of death of other members	Credits of decedent out of Fund against such amounts	Amounts paid by decedent on account of death of other members
1. Between January 15, 1925 (when decedent became a member—R. 23) and January 10, 1941 (statutory cut-off)	$3,185.00	$1,024.52	$2,160.48
2. Between January 10, 1941 and September 11, 1944 (date of death) ..	795.00	795.00	—
3. Between September 11, 1944 and July 19, 1945 (when membership was transferred, see R. 26) by his estate	255.00	255.00	—

(See R. 27, 45).

The Tax Court (two members dissenting) held that no part of the $20,000 was includible as insurance, and hence the Tax Court did not reach the question of whether there were incidents of ownership or payment of premiums (R. 32). The United States Court of Appeals for the Second Circuit reversed, holding the whole amount includible, with a partial dissent by Judge Learned Hand (R. 62-64) on the ground that the decedent possessed no incidents of ownership in the "insurance" after January 10, 1941, and hence only about one-quarter of the total should have been included. Judge Hand apparently regarded the credits both before and after the decedent's own death as premiums paid by the decedent (R. 63-64).

Specification of Errors to be Urged

The Court of Appeals for the Second Circuit erred

(1) In its holding that the $20,000 paid as a result of the New York Stock Exchange Gratuity Fund plan was receivable under a policy of insurance upon the life of the decedent.

(2) In holding that if this was insurance, the decedent possessed any incidents of ownership therein after January 10, 1941; and also that he paid premiums thereon after the date, and that the amount of such premiums was $1,050.

(3) In reversing the decision of the Tax Court.

Reasons for Granting the Writ

1. The phrase "incidents of ownership", occurring in both Section 811(g) of the Internal Revenue Code and Section 404(c) of the Revenue Act of 1942, is important in the administration of the tax statutes. Its meaning has never been passed on by this Court, although before the language was used in the statute the Court in *Chase National Bank* v. *United States*, 278 U. S. 327, 335 (1929) did list examples of incidents of ownership. The court below, in applying the statute to the situation before it, has given the phrase "incidents of ownership" a basic and sweeping interpretation, going beyond the suggestions of the *Chase National Bank* case; and has thus decided an important question of federal law which should be settled by this Court.

Section 811(g) of the Internal Revenue Code provides for includibility in the decedent's gross estate of insurance on his life, even though the proceeds are not payable to his estate, if, but only if, either (a) he paid premiums or (b) he had incidents of ownership. If "incidents of ownership" is construed so broadly that such an incident can be found to be possessed by the decedent whenever his life was insured, then it would have been pointless for Congress to insist that one of the alternate requirements be present as

well. Likewise there would become quite meaningless the provision in Section 404(c) of the Revenue Act of 1942, giving partial exemption for those who possess no incident of ownership after January 1941. The decision below approaches, if it does not reach, a breadth that would accomplish that result.

Although a member of the Stock Exchange had on becoming a member no option but to participate in the plan, and had no right either to name or to change the relative who was to receive at his own death contributions from other members, and though he could not pledge or in any way realize upon the right in and of itself, the majority below found an incident of ownership merely from the fact that if a Stock Exchange member ceases to be a member (selling his seat on the Exchange) his next of kin will no longer have the right to receive those contributions from other members of the Exchange.

Judge Learned Hand's dissent strongly states the case for not regarding this situation as creating an incident of ownership in proceeds of the Gratuity Fund plan. His opinion was that a relatively unimportant incidental effect of the sale of something else was not the equivalent of a power to surrender and cancel an insurance policy (R. 63). Those rights of surrender and cancellation, when used with reference to insurance, clearly mean the right to give up the policy independently of anything else, and receive a surrender value (*cf. Chase National Bank* v. *United States, supra*).

The Court of Appeals was also wrong in treating as premiums paid by the decedent payments made out of a fund to the accumulation of which the decedent had contributed an infinitesimally small amount. Moreover, the Court of Appeals was clearly wrong in including in the total the amounts which were paid out of that fund after the decedent's own death.

We urge upon this Court the importance of correcting an obvious misinterpretation of a part of a tax statute necessarily affecting a large number of people.

2. The decision below also involved a basic interpretation of the word "insurance", used in Section 811(g) of the Internal Revenue Code. This word is likewise of great importance in the administration of the tax law. The interpretation given it by the Court below is, in petitioner's view, contrary to the principles enunciated by this Court in *Helvering* v. *Le Gierse*, 312 U. S. 531 (1941) and the companion case of *Keller* v. *Commissioner*, 312 U. S. 543 (1941). (Those cases interpreted the word "insurance" as used in Section 302(g) of the Revenue Act of 1926, as amended, which subsequently became Section 811(g) of the Internal Revenue Code.) In so far as the *Le Gierse* and *Keller* cases are not applicable to the precise point involved here, it is of importance that the Court should give an authoritative interpretation of what is insurance.

The decision of the Court below is also contrary to the spirit of the definition of life insurance in *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139 (1898), where this Court said:

> "Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life." (pp. 151-152)

See also *New York Life Insurance Company* v. *Statham*, 93 U. S. 24, 32 (1876) and *Goldstone* v. *United States*, 325 U. S. 687, 690 (1945); and such cases in the lower federal courts following the *Le Gierse* case, as *Seward's Estate* v. *Commissioner*, 164 F. 2d 434, 437 (4th Cir. 1947); and

Chew's Estate v. *Commissioner*, 148 F. 2d 76 (5th Cir. 1945), *cert. denied*, 325 U. S. 882 (1945).

The previous Supreme Court cases have insisted on the elements of risk shifting and risk distributing as necessary to insurance; and have emphasized the dependence of life insurance on the law of averages, and on calculations of life expectancy and the determination of a premium with reference thereto. These elements are lacking in the Stock Exchange plan which, as the statement above shows:

(a) does not have premiums based in amount on the risk involved or the life expectancy of any member;

(b) does not provide for sharing the risk on any equitable basis;

(c) does not distribute the risk sufficiently widely for the law of averages to apply (there are only 1,375 members of the Stock Exchange);

(d) does not in any proper sense involve risk sharing and risk distributing.

In short, the plan does not meet the present day common understanding of what constitutes insurance and does not conform to basic actuarial principles. There was, furthermore, nothing that could properly be called a "policy," although the statutory requirement calls for inclusion of amounts receivable "under policies upon the life of decedent."

Not only is a general construction of the term "insurance" important but the application of the word to these particular facts directly affects far more people than the one taxpayer who is petitioner here.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated, New York, N. Y.
September 1, 1950.

Respectfully submitted,

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